



MARC S. GERSTMAN  
DEPUTY COMMISSIONER AND GENERAL COUNSEL

STATE OF NEW YORK  
DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION  
ALBANY, NEW YORK 12233

August 14, 1992

Wallkill Valley Railroad Co.  
P.O. Box 460  
Rosendale, New York 12472  
Attn: John E. Rahl

Dear Mr. Rahl:

By letter dated June 4, 1992, you requested a declaratory ruling with respect to your standing under permits issued to the Wallkill Valley Railroad Company ("Company"). It is our understanding that you contend that the Company is exempt from the permit requirements of Environmental Conservation Law (ECL) Article 15, Protection of Waters, by virtue of rights granted by these permits. You also allege that the property of the Company, by virtue of its recognition by Federal authority, is similar to an Indian reservation where State laws do not apply. For reasons discussed below, it is my opinion that the Company is not exempt nor does its property have any status comparable to that of an Indian reservation.

The first permit was issued to the Company by the Town of Rosendale, Ulster County, in 1888. The permit authorizes the Company to construct and maintain abutments to support its trestle bridge over the highway and Rondout Creek near the Village of Rosendale upon condition that the same be so constructed as to not interfere with travel upon the highway. The second permit was issued, also in 1888, by the Delaware and Hudson Canal Company and authorized the Company to temporarily occupy a portion of canal lands for the purpose of locating trestle bents used in repair of its bridge over the canal (This permit describes the area where the work was contemplated as "a point where the Wallkill River is crossed by the Railroad bridge," a location different from the one referred to in the Town of Rosendale permit. We assume, and you have confirmed, that this was an unintentional oversight and that the permit should have referred to the Rondout Creek).

Included in the material and documents that you sent us in connection with your request is a deed from Consolidated Rail Corporation to yourself conveying the railroad right-of-way of

the Wallkill Valley Branch of Consolidated Rail Corporation together with the Rosendale bridge and all other bridges and improvements located thereon. For purposes of this ruling only, it is conceded that as grantee under this deed you succeeded to whatever rights the Wallkill Valley Branch had by virtue of the two permits herein above described.

We understand your position to be that the permits from the Town of Rosendale and the Delaware and Hudson Canal Company authorize you to undertake work in the bed or banks of the Rondout Creek in connection with repair or maintenance of your bridge over the creek without obtaining a permit pursuant to the provisions of Article 15 of the ECL. We disagree. You have not cited, nor have we found, any authority which supports the contention that the Company is exempt from statutory requirements. Similarly, you have not cited, nor have we found authority to support the proposition you advance that a railroad, given certain forms of recognition by Federal authority as such, need not apply for permits mandated by state law.

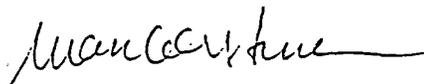
Under ECL §15-0501 and its implementing regulations, 6 NYCRR Part 608, it is required that in order to change, modify, or disturb any protected stream or its bed or banks a permit must be obtained from the Department of Environmental Conservation ("DEC"). Certain local public corporations, persons undertaking emergency work, and some limited agricultural activities are specifically exempt from permit requirements. Had the Legislature intended to exempt any other entity, such as a railroad, from the requirements of the law, it could have done so. Under the maxim "expressio unius est exclusio alterius", where a statute specifically creates exclusions as to certain persons or categories, the existence of other exclusions is denied. Since the Rondout Creek above the Wallkill River to its junction with the Vernoy Kill is classified B pursuant to 6 NYCRR §855.4, it is a protected stream as that term is used in ECL §15-0501. Accordingly, under the clear and unambiguous language of the statute you are required to obtain a permit before undertaking work in the Rondout Creek.

The permits from the Town of Rosendale and the Delaware and Hudson Canal Company do not in any way restrict or preclude the Legislature from exercising its constitutional powers. Article 3, Section 1 of the New York State Constitution vests the plenary legislative power of the State in the Senate and Assembly. Nothing is subtracted from the sum of legislative power, except that which is expressly or by necessary implication withdrawn (Matter of Twenty-Fourth Street Railroad Co., 102 N.Y. 343, 1889). The exercise of rights granted by a municipality or a private company such as the Delaware and Hudson Canal Company (which, incidentally, no longer exists) does not operate to divest the Legislature of its authority under the Constitution. We have reviewed the documents which you submitted to us,

including: (1) Chapter 140 of the Laws of 1850 entitled "An act to authorize the formation of railroad corporations and to regulate the same"; (2) 16 U.S.C. §1247 relating to interim use of railroad rights-of-way under the Federal Trails Act (16 U.S.C. §1241 et seq.); (3) a Columbia Law Review article concerning the origin of the Certificate of Public Convenience and Necessity; and (4) the certificate of incorporation of the Wallkill Valley Railway Company. None of these materials declares or necessarily implies that the Company is exempt from lawfully adopted enactments of the State Legislature. The State has ample power to regulate the performance by a railroad company of its public functions (People v. Brooklyn and Queens Transit Corp., 283 N.Y. 484, 1940).

For the reasons set forth above, we conclude that the Company is required to obtain a permit before undertaking any activity which will change, modify or disturb the Rondout Creek or its bed or banks in the vicinity of your trestle bridge in the Town of Rosendale.

Sincerely,



Marc Gerstman  
Deputy Commissioner and  
General Counsel